Supreme Court, U.S.
FILED

961277 FEB 11 1997

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1996

WILLIAM BRANCH

Petitioner,

-v-

TOWER AIR, INC., STEPHEN L. GELBAND, MORRIS K. NACHTOMI, GOLDMAN SACHS & CO., LEHMAN BROTHERS. INC. and MORGAN STANLEY & CO. INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AVROM S. FISCHER
Attorney for Petitioner
786 East 19th Street
Brooklyn, New York 11230
(718) 434 7696

13 pp

QUESTION PRESENTED

Are the due process requirements of the Fifth Amendment of the United States Constitution and the adequacy requirement of Rule 23 Fed. R. Civ. Proc. satisfied when, as part of a class action settlement, claims pending in another class action matter in a different court, but not in the forum court, are also settled in a non adversarial process by a "settlement" class representative plaintiff who had never prosecuted the non-forum claims that were being settled.

PARTIES TO THE PROCEEDINGS

Petitioner William Branch ("Petitioner") was the objector-appellant in the Court of Appeals. He had objected to the settlement of a class action in the District Court. Respondent Air Parness ("plaintiff") was the plaintiff-appellee in the Court of Appeals. Respondents Stephen L. Gelband, Morris K. Nachtomi, Tower Air, Inc., Goldman Sachs & Co., Lehman Brothers. Inc. and Morgan Stanley & Co. Incorporated were defendants-appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Branch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 13 , 1996.

OPINIONS BELOW

The order of the Court of Appeals is unreported and is reprinted in the Appendix in the back of the Petition at pp A1-A2. The decision of the United States District for the Eastern District of New York approving the settlement of this settlement class action and dismissal of the Second Amended Complaint which is unreported, was given orally during the settlement hearing held on February 9, 1996. The transcript of the settlement hearing is reprinted at pages pp A3-A36 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Section 11 of the Securities Act of 1933 - 15 U.S.C.A. § 77k

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not

misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as

provided therein who shall sustain the burden of proof--

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that

there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective

interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 38 of the Securities Exchange Act of 1934.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section

exceed the price at which the security was offered to the public.

Section 12 of the Securities Act of 1933 - 15 U.S.C. § 77l

Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who--

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any

portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

Federal Rules of Civil Procedure, Rule 23

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their

interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request

exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The

orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF CASE

This action arose out of the initial public offering of defendant respondent Tower Air, Inc ("Tower"), a United States flag commercial airline that provided both scheduled and charter service. The action was commenced in the United States District Court for the Eastern District of New York as a class action on behalf of purchasers of Tower stock between November 15, 1993 and March 24, 1994. It was initially alleged that the Registration Statement and Prospectus of Tower were misleading, giving rise to claims under §§ 11 and 12 of the Securities Act of 1933. ("Securities Act"), 15 U.S.C. §§ 77k, 77l. Jurisdiction was initially predicated on § 27 of the Securities Act, 15 U.S.C. § 77(v) and 28 U.S.C. § 1331.

Pursuant to Rule 23(e) Fed. R. Civ. Proc. the District Court authorized the use of a settlement class and approved the settlement of the action below on February 9, 1996. As a condition of the settlement defendants' counsel demanded and plaintiff's counsel agreed to also dismiss the claims ("Core Allegations")[1] that were the subject of an action that had been brought by Petitioner in the Southern District of New York. As part of the settlement agreement it was agreed that plaintiff would file a Second Amended Complaint containing the Core Allegations which would then be dismissed. Plaintiffs' counsel stated that the consideration for the release of the

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[1] These claims were described in the Notice to the class as the "Core" allegations of the action that had been filed by petitioner in the Southern District of New York against the defendants and Tower's auditor, Ernst & Young.

claims set out in Core Allegations was "nominal". [J772][2]

In their determination of whether to permit the use of a settlement class both the District Judge and the Magistrate Judge were dependent upon the information that was furnished by plaintiff's counsel. Neither the District Judge nor the Magistrate Judge had occasion to acquire familiarity with the merits of the original claims or the Core Allegations in any adversarial proceeding in this action. No motions to dismiss the complaint or for summary judgment were made in the District Court. The Docket entries show that there was no conferences with the District Judge until the November 1, 1995 hearing to fix the date for the settlement hearing. [Docket Entry 32] The only discovery disputes, which were before the Magistrate Judge, involved defendants' discovery of the plaintiff's experience as a class action plaintiff in other litigation, and not the merits of the claim. [760]

The Core Allegations had not been the subject of any adversarial proceedings in this action prior to the settlement process. Petitioner was not a party to this action except as an objector to the settlement. That occurred after plaintiff's counsel had conducted his discovery to justify the settlement. The Second Amended Complaint which incorporated the Core Allegations was filed October 19, 1995 [J368] as part of the settlement process. Plaintiff's counsel stated that discovery with respect to the Core Allegations did not begin until after the "adversarial mode" had terminated with the agreement in principal on the settlement in August 1995. The non-adversarial mode discovery was then conducted to justify a settlement. [J769,J779] The three depositions that were taken by plaintiff of the defendants' witnesses were taken in the fall

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[2] This and similar references preceded by the letter "J" are to the Joint Appendix in the Court of Appeals.

of 1995 after the parties had agreed on a settlement and they were taken to confirm the settlement. [J769] Plaintiff had not taken any depositions while this case was in adversarial mode.

The Magistrate Judge's only experience with the merits of the Core Allegations occurred in connection with the settlement conference that she held. It was agreed that to satisfy defendants' demand that the Core Allegations be disposed of, the settlement would include the Core Allegations. [Docket Entry 10] It was not in plaintiff's counsel's interest at the settlement conference to submit evidence that the Core Allegations had merit. He had done nothing to prosecute them. He had known of the Core Allegations for over a year. To urge that the Core Allegations had merit would reflect adversely on his diligence. Plaintiff's counsel had first learned of the Core Allegations in July 1994, four months after this action was filed and approximately fifteen months before the complaint was amended to include the Core Allegations. [J758] Tower showed plaintiff's counsel the April 1994 letter Petitioner's counsel had written to Tower outlining some of the findings of an investigation he was making on behalf of the Petitioner. [J758] Plaintiff's counsel did not begin discovery with respect to the Core Allegations prior to agreeing to settle them.

As part of the settlement, Plaintiffs' counsel also expanded the class to include all persons who purchased the stock of Tower from the date of the public offering to the present and not just those who purchased prior to March 24, 1994.

Neither Petitioner nor his counsel were parties to any of the settlement conferences.

The Hajj Claim and the Core Allegations that were added in the Second Amended Complaint

On March 23, 1994 Tower announced that it would not

receive a contract from P.T. Garuda,("Garuda") the national airline of Indonesia, to fly Moslem pilgrims to Jeddah in Saudi Arabia for the annual Hajj pilgrimage. The price of its stock fell that day from about 15 to about 12 1/2. Overall the price of Tower stock has fallen steadily from approximately 15 1/2 on the public offering to less than 4 now. Within 24 hours of that announcement, Plaintiff-Appellee rushed to file a complaint against Tower alleging that the Registration Statement and the Prospectus used on the public offering were misleading in not disclosing that more than eight percent of Tower's annual revenue for fiscal year 1993 was derived from a single one year contract with Garuda." [J756] Plaintiff's counsel in his fee application points out in response that "defendants would assert that on page F-18 in the Notes to Financial Statements Section in the Prospectus did disclose that those revenues came from a single source and that it could be also discerned from the Prospectus that this derived from Religious Pilgrimage Revenue." [J775]

In August 1994 plaintiff filed an amended complaint which named the three lead underwriters of the offering as additional defendants. A change was made in the Hajj allegations. It was alleged on information and belief that the likelihood of Tower gaining the contract with Garuda in 1994 was misrepresented .

When the parties had agreed upon the settlement amount, they also agreed to dispose of the claims reflected in the Core Allegations in the Second Amended Complaint. The principal Core Allegations that were included in the Second Amended Complaint were:

> (a) There was a $62 million discrepancy between book value as shown in the Prospectus and the fair market value of the flight equipment which was not commented on in the Prospectus; the $62 million discrepancy was more than double stockholders equity.

[J352,¶33].

(b) The FAA had calculated it would cost an operator $2.3 million for a Boeing 747-100 to comply with the Airworthiness Directives issued by the FAA under the Aging Aircraft Program, AD 90-06-06, (55 FR 8374), AD 90-25-05, (55 FR 49268) when Tower had claimed in the Prospectus in response to SEC instructions in its comment letter that it would only spend $700,000 per aircraft over the next four years (see also Item 303 of SEC Regulation S-K, 17 C.F.R. 229.303) [J353,¶34])

(c) Tower had a rate of inflight engine shutdowns per thousand hours that was more than double the rate of inflight engine shutdowns of the American Airline Industry [J354-5,¶38][3] (In each of the four months preceding the IPO the Tower rate of inflight engine shutdowns even exceeded the upper control limit or UCL. [J307])

(d) The range in the Prospectus of the Tower aircraft was overstated by 5-6%. [J353-4,¶37] which was critical on Tower's most important and longest route.

(e) Tower of all the major and national U.S. Airlines had the worst rate of consumer complaints as well as the worst rate of passengers denied boarding (overbooking) in every single quarter of 1992 and 1993 according to the records of the Department of Transportation. [J354-5,¶38] (The raw numbers had

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[3] Tower Air's own internal documents to which plaintiff's counsel had access when he filed the Second Amended Complaint show that in the twelve months preceding the IPO Tower Air's rate of inflight engine shutdowns was actually three to four times the rate of industry inflight engine shutdowns and even exceeded the Upper Control Limit[J306-J307].

been disclosed, but not Tower's consistent ranking as the worst airline.)

(f) Tower used misleading advertising. [J356-7,¶43k]

Petitioner's counsel's investigation of the Core Allegations

On February 25, 1994, Petitioner's counsel wrote to Tower about the frequency with which Tower aircraft stopped on non-stop flights to Israel. He had clients who had experienced on numerous occasions on flights to Israel their aircraft stopping for refueling. [J396,J472-3] The Tower flights to Israel were and are listed as non stop in the computerized airline reservation systems and the Official Airline Guide. ("OAG") Tower's largest source of revenue is scheduled passenger service between New York and Tel Aviv. [J857] It provides over 25% of its revenue. [J857] Tower responded that the stops are for refueling, "stops of this nature are infrequent", and the "majority of technical/ refueling stops are planned prior to takeoff." [J396,J472-3]. Petitioner's counsel subsequently learned that Tower was then stopping for refueling over 40% of the time on its scheduled nonstop service to Israel, and not the 15% Petitioner's counsel had been led to believe from conversations with the FAA. Petitioner's counsel had also contacted officials of the FAA who had referred him to Tower on the grounds that this was a consumer issue.

Shortly afterwards, petitioner's counsel was retained by petitioner to represent him in a possible action in connection with his investment in Tower. After petitioner's counsel had conducted a preliminary investigation of matters of public record including relevant news media stories concerning Tower and filings by Tower with the SEC, the FAA, and the Department of Transportation, he consulted with two aviation professionals, Yakov Morgan, and Timothy Howe. [J462] Mr.

Morgan had retired as Vice President of Operations for El Al. Mr. Howe was active in the aviation industry as an aircraft lessor and as an aircraft broker.

On April 18, 1994, petitioner's counsel wrote to Morris Nachtomi, Tower's Chief Executive officer and its principal shareholder, outlining his findings which subsequently plaintiff's counsel pointed out formed the basis for many of the Core Allegations. [J758]. In their response Tower did not point to any factual errors in Petitioner's counsel's review of the facts.

The sealing of the discovery in this action.

After the Notice of Settlement was sent to the class, Petitioner was able to obtain access to the discovery material upon which plaintiff's counsel relied. Prior to that Petitioner could not obtain access to it. All of the discovery material that plaintiff had access to was subject to a confidentiality order which enabled the defendants to designate all discovery material as confidential and to restrict use of that material solely to this action. It cannot be used in any related action. The order also required that any papers referring to the confidential material be filed under seal. The entire court settlement file has been sealed because of the references to the discovery material. The Briefs and Appendix in the Court of Appeals are also sealed.

The District Court denied Petitioner access to the expert reports and opinions upon which Petitioner relied in evaluating the Core Allegations except for the expert materials actually filed in Court. [Docket entry 31] The experts reports and opinions which plaintiff's counsel relied upon in his initial evaluation of the Core Allegations were used as both a shield and a sword. Plaintiff relied upon those reports and opinions in claiming there was no merit to the Core Allegations, but

plaintiff's counsel was able to shield those opinions from Petitioner.

The discovery taken by plaintiff's counsel with regard to the Core Allegations.

Plaintiff's counsel in the deposition of William Cain, the Tower Vice President of maintenance, avoided asking the follow up questions that would have definitively established that Tower decided to retire its flight equipment, principally six 21-23 year old Boeing 747-100 prior to the expiration of their useful lives rather than perform the mandated maintenance required under the Federal Aviation Authorities Aging Aircraft Program. The change in the useful life of the aircraft would have required a write down of the carrying value of the flight equipment to its current market value and disclosure of the $62 million discrepancy between the book value of the Tower aircraft and the fair market value of that equipment which was more than double the Stockholders' Equity of $28.877 million shown in Prospectus. [J352,J891,J464-465]. Pursuant to Rule 11 Fed. R. Civ. Proc., plaintiff's counsel when he signed the Second Amended Complaint "had certified to the best of the [his] knowledge, information, and belief formed after reasonable inquiry [that the allegations as to the fair market value of the aircraft, and the difference between the fair market value and the book value of the equipment] were well grounded in fact."

The Tower Air defendants in their memorandum in support of the settlement at Page 19, fn 8, had relied upon Kay & Searfoss, *Handbook of Accounting and Auditing*,(2d Ed. 1989, Supplemented 1994). In Kay & Searfoss, it was stated:

Disposal

The final transaction in the capital asset cycle is disposal. Ultimately, property assets will be retired, either by sale,

exchange, abandonment, or scrapings.

Kay & Searfoss at 15-4

The authors further stated:

> **Asset Impairment Write-Down** When management decides on the disposal of some element of property, plant, and equipment, its net realizable value should be estimated. If this is less than the net carrying amount, a write-down should be recorded to place the asset on a realizable value basis. If the asset is expected to be sold within 12 months, the asset should be carried as a current asset.

Kay & Searfoss at 15-17

Furthermore, in view of the change in the useful life of the aircraft in light of the decision to not perform all of the Aging Aircraft Program Tower Air was obligated under Accounting Principles Board Opinion No 20 to disclose the change in the useful life of the aircraft. APB 20.31 provides:

> The Board concludes that the effect of a change in accounting estimate should be accounted for in (a) the period of change if the change affects that period only or (b) the period of change and future periods if the change affects both. A change in an estimate should not be accounted for by restating amounts reported in financial statements of prior periods or by reporting pro forma amounts for prior periods.

The SEC in its comment letter on the Prospectus had instructed Tower Air to "clarify whether increased maintenance cost due to the age of the Company's fleet of aircraft is currently being incurred or will be in the future".[293] Tower Air did not identify any work that it was doing in compliance with the Aging Aircraft programs. See also Item 303 of SEC Regulation S-K, 17 C.F.R. 229.303

The SEC also instructed Tower Air to address "the

specific schedule of replacement for major parts for the Company's aircraft"[293] Tower Air did not identify a single major part that it was going to replace. See also Item 303 of SEC Regulation S-K, 17 C.F.R. 229.303

The SEC also instructed Tower Air to disclose "the extent of compliance with required component replacement schedule, noise abatement requirements and with the Airworthiness Directives related to structural modifications."[293] Item 303 of SEC Regulation S-K, 17 C.F.R.229.303 With the exception of compliance with Stage III noise abatement requirements which only involves the placing of a placard on the aircraft at nominal cost.(57 FR 46944)[4] Tower Air did not identify any work that had been done.

In the Prospectus Tower Air responded to the comments of the SEC by stating the "Company estimates that the cost of compliance with [Airworthiness Directive under the Aging Aircraft Program] over the next four years will be up to $700,000 per B747 aircraft". [J834]

As a result of the focus on older aircraft following the April 1988 Aloha incident where a section of the roof of the aircraft was torn off the FAA has adopted a program that requires modifications or replacement of certain parts, components, or sections of the aircraft at specified periods even if inspection did not reveal a problem. The program is referred to as the Aging Aircraft Program. On the date of the public offering just one of the major Airworthiness Directives ("AD") issued by the FAA under the Aging Aircraft Program required a minimum expenditure of over $2.300 million each

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[4] All wide bodied aircraft, namely the Boeing 747, Lockheed L-1011, and McDonnell-Douglas DC-10 use high bypass ratio engines and met Stage 2 noise requirements. (46 FR 33454)

Boeing 747 aircraft. This Airworthiness Directive required the installation of the structural modifications identified in "Aging Airplane Service Bulletin Structural Modification Program -- Model 747", Boeing Document Number D6-35999, AD 90-06-06, Amendment 39-6440, (55 FR 8374, March 7, 1990). The FAA stated that the "cost to modify each airplane is estimated to be $2,300,000" in the Notice of Proposed Rulemaking, Docket No. 89-NM-68-AD, 54 FR 22300. The cost for the equivalent programs on other models in the Boeing fleet were less. For example, the FAA had calculated that the cost of implementing the Aging Airplane Service Bulletin Structural Modification Program for the Boeing 737 at $898,070 (55 FR 8372) for the Boeing 727 at $1,057,212 (55 FR 8370), and for the Boeing 707 at $1,040,000 (56 FR 13073).

William Cain, the Tower Air vice president of maintenance testified that rather than perform all the required maintenance under the Aging Aircraft Program, Tower Air was going to retire its owned Boeing passenger 747-100 aircraft. His testimony was as follows:

> Q. On page 10 of Plaintiffs' Exhibit 1, second full paragraph, the third sentence where it says, "The company estimates that the cost of compliance with such directives." Do you see that?
>
> A. Uh-huh. Yes.
>
> Q. The cost of compliance was approximately $700,000?
>
> A. Right.
>
> Q. How was this figure arrived at?
>
> A. It was an estimate based upon, we were looking at the work that was going to be mandatory to accomplish on the aircraft and on all of our aircraft that we had owned at that time, different degrees or different parts of the work had already been accomplished so we tried to estimate what the average cost of accomplishing the

remaining work would be on each of the aircraft that we owned.

Q. So the $700,000 figure refers only to what would be mandatory?

A. That's correct.

Q. Mandatory compliance?

A. There were parts of the aging aircraft program which we did not contemplate accomplishing at that point in time, and these items were items that were mandatory that we would have to accomplish.

Some of the cycle-related items that were far out in the future, our mindset at this point in time was that we would not accomplish those, that we would retire the aircraft before in fact they reached that threshold requiring the mandatory termination of those particular items.

The 700,000 basically dealt with items that we knew we would have to accomplish before we retired the aircraft because of our intended continued operation of them.

[J267-J269]

Plaintiff's counsel asked no follow up questions of either Mr. Cain, Ms. Essex, the internal accounting officer, who also testified, or Mr. Nachtomi, the chief executive officer of Tower, concerning the decision not to do all the required maintenance on the six aircraft, when the aircraft would be retired, when was the change made in the useful life of the aircraft, or why the change in the useful life and the resulting change in the carrying value of the aircraft was made.[J38-J291]

Pursuant to Rule 11 Fed. R. Civ. Proc., plaintiff's counsel when he signed the Second Amended Complaint "had certified to the best of the [his] knowledge, information, and belief formed after reasonable inquiry [the allegations that the Prospectus misrepresented the cost of Tower's compliance with

the FAA's aging Aircraft Program] were well grounded in fact.

There was no follow up by plaintiff's counsel with either Mr. Cain, Mr. Nachtomi or Ms. Essex why given the discrepancy between the FAA's figures for the cost of the mandated Aging Aircraft Program and the disclosure made in the Prospectus, Tower did not explain the discrepancy in the Prospectus.

Pursuant to Rule 11 Fed. R. Civ. Proc., plaintiff's counsel when he signed the Second Amended Complaint "had certified to the best of [his] knowledge, information, and belief formed after reasonable inquiry [the allegations that the figures in the Prospectus as to the range of the aircraft were misleading and that Tower's advertising was misleading] were well grounded in fact.

In the course of examining Morris Nachtomi about Tower's aircraft repeatedly stopping on flights to Israel that Tower advertised as non-stop, plaintiff's counsel elicited testimony that the hostilities in the former Yugoslavia sometimes increased the distance the aircraft had to fly on the way to Israel. Plaintiff's counsel cited this testimony in claiming there was little merit to the Core Allegations.[J764] Plaintiff's counsel did not ask the logical follow up question, why was Tower even overflying the former Yugoslavia. Payments to the governments in the former Yugoslavia (which would include the payments for overflight rights) were bared by Executive Order 12846 of April 25, 1993, 58 FR 2577131 CFR Part 585, 58 FR 35828. Accordingly Tower Air could not have legally planned overflights of that area and the hostilities should not impacted on its flights.

Given the extraordinary high number of stops on the non-stop route, if in fact the stops were unplanned plaintiff's counsel did not ask the logical question, what was the FAA doing in the face of these numerous unplanned stops. The FAA requires that flights carry sufficient fuel reserves to cover

contingencies, 14 CFR 121.645

Plaintiff's counsel also elicited testimony from Morris Nachtomi regarding construction at Ben Gurion Airport which shortened the runway and thus making it difficult to take off with a full load of fuel. Plaintiff's counsel cited this testimony in seeking to justify Tower's not disclosing in the Prospectus that it was falsely advertising its flights to Israel as non-stop and its misstating the range of its aircraft.[J764] Plaintiff's counsel did not ask the logical question what bearing did the shortened runways at Ben Gurion Airport have on Tower advertising its New York to Israel flights as being non-stop. The runways at Kennedy International Airport from which the flight to Israel originate are among the longest in the world.

Pursuant to Rule 11 Fed. R. Civ. Proc., plaintiff's counsel when he signed the Second Amended Complaint "had certified to the best of the [his] knowledge, information, and belief formed after reasonable inquiry [the allegations that Tower experienced in flight engine shutdowns of more than twice the American airline industry average per 1000 flight hours] were well grounded in fact.

Morris Nachtomi in response to the question whether as of June 16, 1993, the engine shutdown problems were resolved, testified that they were.[J116] Plaintiffs' counsel accepted this answer and did not ask Mr. Nachtomi to document that assertion. Plaintiff's counsel even relied on it in his brief. But the "Tower Air Fleet Reliability Report, Engine inflight shutdown rate" directly contradicts that answer. The report shows that in November 1993 and the three months preceding the IPO Tower Air's rate of inflight engine shutdowns was four times greater than the American Industry as a whole. It was even above the UCL or Upper Control Limit. In David S. Moore, *The Basic Practice of Statistics,* (W. H. Freeman and Company, New York, 1995) it was pointed out at page 308 that "any [x bar] that does not fall between the control

limits is evidence that the process is out of control". The reliability report was part of the defendants' document production to plaintiff's counsel. Plaintiff's counsel did not confronted Mr. Nachtomi with the reliability report and asked him to explain the contradiction between his testimony and the facts shown in the report.

Plaintiff's counsel accepted at face value Mr. Nachtomi's testimony that the Inflight engine shutdowns experienced in flying Hajj for Garuda were not due to desert conditions and so urged to the Court[J765] as an excuse to not require disclosure of the high rate of inflight engine shutdowns that Tower Air had experience.

There was substantial evidence in the record which plaintiff's counsel could have used to cross examine Morris Nachtomi that the high rate of Inflight engine shutdowns was due to desert conditions and not to inadequacies in Tower Air's own maintenance which should have been disclosed to investors.

In a letter labeled dated February 10, 1993 from T. S. Bailey, Manager JT9D Technical Support, Customer Support Department of United Technologies, Pratt & Whitney to Norman Perenson, Manager, Power Plant Engineering, Tower Air,[J298-J300] he stated that the inflight shutdown rate at Tower Air had been a "focus at Pratt & Whitney and the subject of FAA concerns recently."[J298] In this letter he repeatedly admonished Tower Air that the problems basically involved not following basic routine preventive maintenance and ignoring service bulletins. It was even pointed out "Please note that most of these service bulletins are NOT very expensive".[J299] The comment at the end of the next to last paragraph with regard to two particular engines is equally applicable to all the problems found by Pratt & Whitney. The comment of Pratt & Whitney was:

> This suggests that troubleshooting was

inadequate, and the follow-up to verify that the corrective action taken was not effective. [J300]

Among the specific problems that Pratt & Whitney specifically warned Tower Air about were surge problems from improper maintenance of control devices such as the engine vane control,("EVC") Fuel Pump ("FP"), Fuel Air Converter Valve, ("FACV") and the Fuel Control Unit, ("FCU"), Flow Divider ("FD") and Pressure Ratio Bleed Control, (PRBC).[J298] Pratt & Whitney stated that it was "particularly concerned about the level of oil consumption monitoring being done, as it seems that several of the high oil consumption events could have been avoided with a good trend monitoring program."[J299]

These letters had been produced during document production and could have been used by plaintiff's counsel in cross examining Mr. Nachtomi on the high rate of in flight shutdowns..

Of the 12 inflight engine shutdown incidents that occurred in May 1993, seven incidents, namely incident 1 of May 2, 1993, incident 2 of May 7, 1993, incident 5 of May 7, 1993, incident 6 of May 11, 1993, incident 7 of May 11, 1993, incident 8 of May 11, 1993, and incident 9 of May 12, 1993, were due to the failure of control units,[J302-J304] and four were due to oil problems, namely the incident 3 of May 7, 1993, incident 4 on May 8, 1993, incident 11 of May 19, 1993, and incident 12 of May 25, 1993.[J302-J304] Of the 12 incidents of inflight engine shutdowns, 11 were predictable and Tower Air had been specifically warned by the manufacturer that such incidents could be avoided by simple routine maintenance.

With one exception, all of the inflight engine shutdowns occurred at altitude.[J301-J304] The report on the only inflight engine shutdown, namely incident 11, that occurred at

ground level on takeoff, does not indicate that it was due to desert conditions.[J304] This material had all been presented in the document production and could have been used to challenge Mr. Nachtomi's testimony on cross examination.

The status of Petitioner's own action against the defendants.

On the basis of the Court of Appeals' affirmance of the District Court Judgment approving the settlement and dismissing the complaint in this action, Defendants asked the District Court where Petitioner's own action was pending to dismiss the action with prejudice. That application was granted. In the event that Petitioner should be successful in obtaining a vacation of the judgment on this appeal, Petitioner would than move pursuant to Rule 60 (5) and (6) Fed. R. Civ. Proc. to vacate the judgment in the other Court. In view of the remedies under Rule 60 (5) and (6) Fed. R. Civ. Proc. there is no need to burden the Court of Appeals with a protective appeal.

REASONS FOR GRANTING THE WRIT

This case illustrates the very danger discussed in *In Re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 786 (3d Air. 1995). The Court had observed:

> In particular, settlement classes create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members [**47] who have not yet been apprised of the pendency of the action. Moreover, because the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with the defendants by underselling

the plaintiffs' claims relative to other attorneys. Unauthorized settlement negotiations occurring before the certification determination thus "create the possibility of negotiation from a position of weakness by the attorney who purports to represent the class." *GM Interchange Litig.*, 594 F.2d 1106, 1125 (7th Cir. 1979).

(55 F.3d at 789)

The Court further noted:

> Indeed, if any difference in standards is warranted, pre-certification settlement may raise the adequacy of representation standard. Since this inquiry must ascertain "whether there has been any collusion or undue pressure by the defendants on would be class representatives," see First Comm. Corp. of Boston Consumer Accts. Litig., 119 F.R.D. 301, 308 (D. Mass 1987); Alvarado Partners LP v. Mehta, 723 F. Supp. 540, 546 (D. Colo. 1989), it must carry greater weight in the settlement class context where there is an enhanced potential for those evils. Thus, while the other 23(a) findings remain important when the action settles, the need to assure an absence of collusion and an alignment of interests assumes an especially crucial role. Reliance, for the class requisites analysis, on the settlement's terms and process also increases the importance of an independent conclusion of adequate representation (i.e., one not derived solely by reference to the nature of the negotiations)

(55 F.3d at 799)

The Court quoted with approval the warning by Judge Posner about collusive settlement in *Mars Steel v. Continental Illinois Nat'l Bank & Trust,* 834 F.2d 677 (7th Cir. 1987)

> Judge Posner has explained the animating concern behind this strict application. "The danger of a premature, even a collusive, settlement is increased when as in this case the status of the action as a class action is not determined

until a settlement has been negotiated, with all the momentum that a settlement agreement generates . . . ."
(55 F.3d at 800)

Clearly, there is a conflict between the way the Third Circuit would review a settlement class action where the settlement did not involve an adversarial negotiation and the way the Second Circuit reviewed this case.

This matter presents an important issue for this Court since the judicial involvement in the class action settlement reflects not only on the integrity of the settlement process but more importantly on the public's perception of the judicial process.

CONCLUSION

For the foregoing reasons, the petion should be granted.

AVROM S. FISCHER
Attorney for Petitioner
786 East 19th Street
Brooklyn, New York
11230
(718) 434 7696

February 11, 1997

DECISION OF COURT OF APPEALS

IN RE: TOWER AIR, INC., SECURITIES LITIGATION;
ARI PARNES, Plaintiff-Appellee,
WILLIAM BRANCH, Objector-Appellant,

- v. -

STEPHEN L. GELBAND, MORRIS K. NACHTOMI, TOWER AIR, INC., GOLDMAN SACHS & CO., LEHMAN BROTHERS INC. and MORGAN STANLEY & CO. INCORPORATED, Defendants-Appellees.

No. 96-7284

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

1996 U.S. App. LEXIS 33706

November 13, 1996, Decided

NOTICE: RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of New York. This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

DISPOSITION: Affirmed.

COUNSEL: Appearing for Appellant: Avrom S. Fischer, Brooklyn,

N.Y.

Appearing for Plaintiff-Appellee: Stanley D. Bernstein, Bernstein Liebhard & Lifshitz, N.Y., N.Y.

Appearing for Defendants-Appellees: Samuel Kadet, Skadden, Arps, Slate, Meagher & Flom, N.Y., N.Y.

JUDGES: Present: HONORABLE AMALYA L. KEARSE, HONORABLE JOHN M. WALKER, JR., HONORABLE DENNIS G. JACOBS, Circuit Judges.

OPINION: SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated by Judge Raggi on the record on February 9, 1996. The district court is required to determine whether a class action settlement is fair, adequate, and reasonable, and not a product [*2] of collusion. See, e.g., Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1079 (2d Cir. 1995); Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982). Since the district judge "is in the best position to evaluate whether the settlement constitutes a reasonable compromise," Handschu v. Special Services Division, 787 F.2d 828, 833 (2d Cir. 1986), her evaluation is to be accorded considerable deference and is reviewed only for abuse of discretion, see, e.g., Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d at 1079; Weinberger v. Kendrick, 698 F.2d at 73. Here, the court meticulously considered the appropriate factors, see generally County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323-24 (2d Cir. 1990), and we see no abuse of discretion in its approval of the settlement.

We have considered all of appellant's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

RELEVANT PORTION OF TRANSCRIPT OF SETTLEMENT HEARING AT WHICH DISTRICT COURT ANNOUNCED DECISION

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THE COURT: In Re: Tower Air litigation. Have you all given your appearances to the court reporter?

ALL COUNSEL: Yes, your Honor.

THE COURT: Please be seated, gentlemen.

MR. FISCHER: Your Honor, may I move the admission of my co-counsel pro hac vice?

THE COURT: These gentlemen are?

MR. ANGSTREICH: Steven Angstreich, your Honor.

MR. COREN: Michael Coren, your Honor.

THE COURT: Are you gentlemen members of the New York Bar?

MR. ANGSTREICH: No, your Honor, we're members of the Pennsylvania and New Jersey Bar.

MR. COREN: Yes, ma'am.

THE COURT: All right. Have formal motion papers been filed yet or is this just an oral application?

MR. FISCHER: It's an oral application, your Honor.

THE COURT: All right. Well, gentlemen, I'll admit you pro hac vice for today, but we do have a standard written procedure, and if I could ask that you comply with it within the next two weeks.

MR. ANGSTREICH: We will do that, your Honor.

MR. COREN: Yes, your Honor.

MR. ANGSTREICH: Thank you.

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THE COURT: Thank you very much. All right, this matter is before the Court for consideration of a proposed class settlement. Now, notices were sent out to, I gather, 5,000 approximately shareholders who could be members of this class. Three responses have been received indicating that persons wished to opt out of the class. Have any more been received since the papers were filed with me?

MR. BERNSTEIN: No more opt outs, your Honor.

THE COURT: And I have one shareholder objecting to the proposed settlement, that's Mr. Branch. Is counsel here?

MR. ANGSTREICH: Yes, your Honor.

MR. FISCHER: Yes, your Honor.

MR. BERNSTEIN: Though, your Honor, we did receive one anonymous fax over the weekend from someone. I don't know what the name is --

THE COURT: I don't know if I have that. Was one sent to chambers?

MR. BERNSTEIN: From this document, it just -- it doesn't identify who it is. It looks like an M. Schwartz. No return address, no fax header. It just showed up on my fax machine complaining about mismanagement and attorney's fees and the notice was defective.

THE COURT: May I see it?

MR. BERNSTEIN: For the record, this was in my

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fax machine this Monday morning, February 5. According to the fax machine's records, it was faxed to me sometime over the weekend, either Saturday or Sunday without any fax cover sheet, without any date, without any indication from where it came, and certainly with no proof that this person is a stockholder, even identifying how many shares he or she claims to own.

THE COURT: Well, I have now read this on the assumption that the person communicating with you is a bona fide member of the class. There actually appear to be two signatures at the bottom of this; an M. Schwartz, and then a J period, and then I can't make out the class name here. So, I'll just assume for purposes of this proceeding that this is two shareholders who are voicing objections. And if I can make a copy of this, we'll docket it. Oh, you have -- then I'll just keep this one, thank you.

Let me just ask in the courtroom, is Mr. Schwartz or anyone acting on his behalf, it might be a Miss Schwartz for all I know, here today? No. All right, because of course the notice advised everyone that this court would be in session today to address precisely this question.

All right, I have read through all of the papers that were submitted and I will be happy to hear anyone any further on this. I do have one question, though, that I can start with. I don't want to listen to the Branch objections

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any further, but, if I do not hold up the settlement, would Branch be entitled to opt out? I mean, technically it was an objection to the settlement rather than an opt out. What would the plaintiff's and defendant's positions be on that?

MR. KADET: Your Honor, if Mr. Branch at this point would wish to opt out and pursue an individual claim, we would have no objection to that.

THE COURT: That's on behalf of the defendants?

MR. KADET: Yes, your Honor, on behalf of the defendant Morris K. Nachtomi and Tower Air.

MR BERNSTEIN: The plaintiffs have no objection.

THE COURT: All right. Well, that, of course, is not Mr. Branch's first request. The first request is that I reject the settlement, but I did want to know whether that was anything that the other parties would object to. Let me hear you, counsel. As I've said, I've read the papers, so you needn't restate those points.

MR. ANGSTREICH: I understand. Your Honor, if I might, in response to your question about what the defendant's and plaintiff's position would be should we be allowed to opt out later, there are three defendants in the Branch action who would be receiving releases as a result of this settlement.

Those are the underwriters who are not before your Honor.

MR. HARDIMAN: We are here, your Honor. I

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represent them.

MR. ANGSTREICH: I understand that they may be in the courtroom. They are not before your Honor because they're not defendants in this action.

MR. HARDIMAN: We are defendant's in this action, your Honor.

THE COURT: I thought so.

MR. HARDIMAN: That's why I showed up.

MR. ANGSTREICH: I apologize, your Honor. If I might, your Honor, because we filed our objections before we had all of the information that has been presented in support, let me just highlight some of the facts that we've come to learn and also address the expert's report, an expert who has come from the affidavit to justify the $2.5 million settlement.

The evidence or the facts of record are clear that at the time a settlement was constructed, there was no facts known by plaintiff's counsel relating to the claims in the Branch action, their strengths or weaknesses. They weren't pled at that point. At the same time, there was no expert report or analysis done to quantify the measure of damages for the class.

What happened quite clearly was that a settlement was constructed and an amended complaint was thereafter filed to incorporate all of the Branch allegations with which the

defendants initially say, in the Southern District, have no merit, but they were incorporated by Mr. Bernstein into a new complaint who now says in his papers before your Honor that they have no merit either.

Again, I assume that they were incorporated in order to dispose of them leaving Mr. Branch and the class that he seeks to represent with respect to them without a remedy for those misrepresentations and omissions which we believe are material.

Then they submit to the Court the Jarrell affidavit attempts to justify the settlement saying, well, Mr.
Jarrell has calculated the damages to be $12 million.
Unfortunately, what Mr. Jarrell has done is used the wrong methodology. Mr. Jarrell has used an average price per share instead of the price in the IPO. And that comes to B-2 or $3.00 per share. Instead of 15.50, I believe his opening number is between 12 and 13 dollars per share.

And then what he's done is he's taken the price per share at the date the complaint was filed, and the case law and Rule 11 -- Section 11, do not deal with price. They deal with value, its value on the date the complaint was filed. And what you would have to do is you have to look to see what the true value of the stock was

on the date the complaint was filed.

What is subsumed in Section 11 is that on the date

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the complaint is filed, the misrepresentations and omissions, which are the subject of the complaint, are made public. And therefore the market then reacts to the disclosures in the complaint to adjust the price, thereby making price equal to true value.

What happened is that it's not until May of 1994 that the complaint is disclosed in the 10Q and at that time we have the first public disclosure of the Hodge issue. And at that point the stock plummets, but Mr. Jarrell doesn't use that price per share and it's that problem that creates this proposed or supposed $12 million damage pot that he views.

If you use the correct starting point which is 15.50, and you use the correct true value as Mr. Miller did in the documentation that we submitted to the Court, the number is 22 to 23 million dollars as to Section 11 damages. So, on it's face, what you're looking at is a settlement that is approximately ten percent of the potential damages from the misrepresentations that even Mr. Jarrell says is material.

We then look at Mr. Jarrell's report and what he tries to do is to say that none of the other misrepresentations are material omissions or misrepresentations, and he tries to do that two ways. One he says, you've got to look at the marketplace and see if the stock reacted, the stock price reacted upon disclosure. Well, that's not a very effective tool if the omissions have not

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been disclosed. And part of what we've alleged in the Branch action is that there are omissions that have never been disclosed as of yet. So, trying to peg a price decline to an omission to back -- to use that and then argue it's material or it's not material is not an appropriate methodology.

The other thing I tried to do is to go to the stock numbers, and he views the numbers and he sets up a T-value. And he says, here is the T-value. Here are the material changes in the price of stock. Let's see how it relates to news stories about Tower Air.

There are 21 significant or material changes in the stock price through his chart. Ten of them have new stories associated with

them. Eleven have no new stories.
So, the question then becomes how material is that methodology.

We then have -- and the only one fact I want to highlight, and that's the value of the planes, because we've been accused of misrepresenting what the requirements are. It is correct that generally accepted accounting principals say that you can use historic value in the balance sheet for these planes.

The problem that we have is that based upon the evidence that Mr. Bernstein assembled through the deposition of Mr. King, Tower Air decided at the time of this IPO that they were not going to do the scheduled maintenance five years
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after. They were going to carry the planes for four years and then liquidate them. And they were going to do that because to do the maintenance required by the FAA could cost as much as $2 million per plane. They weren't going to do that. That is a known fact that creates the possibility or probability of a value effect of these assets. And that value effect is $62 million.

The argument that's been made is that you don't have to mark to --that's called marking to market. You don't have to mark to market if in fact you're not going to sell the planes or you don't know of anything to cause you to mark to market. But Financial Accounting Standard 5 says that if there is a possibility or probability of a contingent event occurring that you're aware of that will materially effect an asset that you're carrying on your balance sheet, you've got to mark to market or footnote. Had they footnoted in the balance sheet that the planes that they were carrying, I believe, at $102 million as an asset value was only worth $40 million, thereby reducing that --the assets of this company by $62 million, that according to our expert is a material fact that an investor had a right to know.

THE COURT: Let me interrupt you for a moment and ask you this. If I were to view these disputed issues in the light most favorable to your client, because I recognize that plaintiff's and defendant's counsel take exception to many of
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these characterizations, but if I were to view these in the light that

you've cast on them, at best it would suggest that they are triable issues about materiality of this.

MR. FISCHER: No, your Honor.

THE COURT: You can shake your head no, no, but let me say this, I do not see how on this record I can simply say that the defendants in this case should just start, you know, disgorging tens of millions of dollars. Your case is so strong. I mean, that I could not do.

What this means is that there is a complex, expensive and very lengthy litigation ahead of everyone on all of these issues, not only the ones originally brought in this court, but the ones that were raised in the Branch litigations. Now, that's one of the factors that is appropriately considered in evaluating the reasonableness of the settlement, similarly, the fact that there may be expert differences about how damages should be calculated.

The possibility that the damages may be established to be significantly higher than what the parties before me have estimated is something that I should consider.

But the bottom line remains that the settlement class, having been given notice of the fact that plaintiff's counsel proposes to settle this case with all of these different disputes now before the Court at $2.5 million, has resulted in one shareholder, possibly two or three, if I'm liberal in

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reading that fax, in short less than a handful of shareholders objecting to this settlement with presumably a vast silent majority eager to get some money back on their loss. Why isn't it appropriate for me, given the fact that I think I can balance the nine factors in favor of this settlement, to approve the settlement and let your client litigate his losses, his damages, if he thinks they are more in some other forum?

MR. ANGSTREICH: Your Honor, there is --THE COURT: Why should I hold up an entire class settlement?

MR. ANGSTREICH: Your Honor, there are two aspects. The first is that the notice that went to the class members does not say that the Branch plaintiffs believe or Branch plaintiff believes that the damages are 22 to 23 million and that the settlement on that basis is

inadequate.
It does not deal with all of the other issues raised in the Branch case. It does not address the fact that counsel for the Branch plaintiff believes that the non-Hodge issues are as material or are as important and as substantial as just the one Hodge issue. And therefore when somebody is reading a piece of paper and basically sees that there's a possibility of getting some money today and they don't have anything to truly balance it against because we had no input in the drafting of that notice and there was not a balance as to what
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Branch was really about, what the damages really were in this case, then I would expect that the only person that's going to walk into this courtroom to object are the counsel that have looked at the documents, read the depositions, had their expert do an analysis, which is the Branch plaintiff's counsel.

So, it doesn't come as a surprise to me and in the 26 years I'm practicing, in all the class actions that I've been involved with, the likelihood of substantial objection is so small, and the only time that objection generally happens is if there's another attorney who has another client who believes that the settlement is inadequate and that attorney comes forward and presents the objection.

There is an alternative, your Honor. Your Honor can certify a settlement class relating to the Hodge claim only.

THE COURT: I don't think that the money is available on those terms. I have to deal with the practical realities that the defendants have agreed to settle provided that they get releases on this class from all of the claims.
Isn't that the terms -- MR. KADET: You are 110 percent correct, your Honor.

MR. ANGSTREICH: Your Honor, at the time that this settlement was discussed, there was one claim only that
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Mr. Bernstein was advancing.

THE COURT: But that was because -- let me say this. I indicated that I was willing to view this in the light most favorable to your client for us to have discussions, but I'm satisfied that

plaintiff's counsel before me did not ignore the totality of the situation arising out of Tower. It is their considered view that the strongest if indeed only claim that they thought they could pursue was the Hodge claim. Now, I will say that having reviewed all of the papers, I can clearly understand why they thought that.

MR. ANGSTREICH: Your Honor, with due respect, the papers that we filed were filed before we had all of the information and before we had any of their submissions in this proceeding. The brief -- THE COURT: I don't understand what that means.

MR. ANGSTREICH: -- the affidavit. Well, your Honor, we --

THE COURT: You're telling me on the one hand that you are experienced counsel so familiar with the Branch claims that I should give serious weight to your desire to pursue them. On the other hand you're now telling me you didn't have all the facts.

MR. ANGSTREICH: Your Honor, I didn't say that.

MR. COREN: No, your Honor. You have their position before your Honor --Page 16

THE COURT: So -- MR. FISCHER: Your Honor, can I be heard on this?

THE COURT: Of course.

MR. FISCHER: Thank you. Your Honor, let's start with the first claim, the $62 million.

THE COURT: No. Let me explain to you, I do not intend to try the case this morning.

MR. FISCHER: I'm not asking you to. I'm just saying what we know. There is no dispute that on the day of this IPO, Tower Air had already elected to not -- to abandon the planes four years down the road. Under APB, Accounts Principal Board 20, when you elect to change the useful life of your aircraft, this is not your -- this is your asset. You have immediate obligation to change your book value. You've got to now market to value. That immediately -- THE COURT: Counsel, I will assume that for a moment, but you're going to have a further burden which is showing that that fact would have effected the price of the stock which is --M R . FISCHER: Certainly.

THE COURT: -- a serious question. I more than understand

how counsel could advance the argument that nondisclosure of the Hodge circumstances could effect the price of the stock. You may persuade a fact finder in the end

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that these accounting issues could have effected the price of the stock, but I suspect that the risks of establishing liability on those claims when one considers all the elements you would have to establish are real and substantial.

MR. FISCHER: Your Honor, this is the exact situation that occurred in Saler versus Lindsay (Ph), exactly to a tee. An attorney who is prosecuting a claim where he had one narrow issue he wanted to settle and he said I'll go in and I'll create a paper record. We're saying to you explicitly, and we'll go through it, that Mr. Bernstein created a paper record after he agreed on the settlement to justify the settlement.

Let's start with the first issue, this plane. $62 million in write down is a difference between a positive stockholder's equity, which is what the book showed, of 30 million, and a negative stockholder's equity of $30 million.

Now, this -- the market value on just the disclosure that a potential $5 million contract was not going to be renewed, the price of the stock he said was significant. That price he said demonstrated the materiality. What is the -- THE COURT: But I can't just ignore the fact that it wasn't that this asset was going to be, you know, frittered away. The airline intended to continue operating. It was all a function of how it would deal with it.

MR. FISCHER: Not with these planes, I'm sorry.

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THE COURT: That doesn't matter necessarily to the stock price.

MR. FISCHER: It does if that's what they -- if they can't --

THE COURT: I'm sorry. I wasn't quite finished and perhaps that wasn't clear.

MR. FISCHER: Your Honor, I apologize.

THE COURT: It doesn't necessarily matter to the stock price whether it was this plane as long it was clear that they were going to have other planes. As I said, I am neither opposing counsel nor

am I trying to preside over this trial, but as I review all of these facts and papers, it appears to me that if you do pursue this claim, you have a very tough road to hoe. I meanwhile have the ability to secure at least some compensation for shareholders who think they've been damaged. Your client is the only one complaining about this.

MR. FISCHER: Your Honor, we are the only people who apparently were aware of the true value, the market value of a 747-100. The only airline in the United States, in fact I believe it's the only airline in the world, and we've documented that because it's a matter of public record if your Honor were to look --THE COURT: The only 747 in the world that what?

MR. FISCHER: 100, your Honor. There's a very

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big difference between a 747-100 configure for passenger service and a 747-400 which allows buying for $140 million.

And that's the whole point here. No -- as you yourself are very surprised to learn, there is a difference in the value of these planes. A 747-100 -- THE COURT: Did I say I was surprised to learn that?

MR. FISCHER: No.

THE COURT: Oh.

MR. FISCHER: Okay. Your Honor's remark is that there were -- we're still coming back to this point, your Honor, that their sole asset, the asset that was carried on their books, was six 747-100s all of whom were over 20 years old. Mr. Nachtomi acknowledged a year later that you could get one for $4 million and he's the only one in the United States buying them.

At the time of the IPO, they had bought a 747-100 for spare parts that was worth -- for $4 million. That was the top value for a 747-100. So that you're saying it wouldn't have been hard to prove. We will be able to submit, and if your Honor could give us a couple of days, we will submit an affidavit from Mr. Howe who is familiar with this area. Unfortunately he broke some ribs, but I have a signed affidavit from him which we'll be able to submit and we'll ask leave to submit additional papers. But he can testify

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explicitly because he's experienced in this area that the 747-100 is only worth $4 million a plane.

Tower is the only one buying the 100. That if you take those six planes, value them at $4 million and they simply, since they had to -- they said they were going to change the use -- abandon the planes in four years, they had an obligation immediately at the time of the IPO to write them down to a fair market value. That's a swing of something like $60 million and it changes a positive stockholder's equity to a negative stockholder's equity.

Now, let's go on so we can go to some of the other points where they explicitly look.

THE COURT: I don't want to simply hear repetition of your papers.

MR. FISCHER: Now, your Honor, this is not -- THE COURT: I have a full calendar.

MR. FISCHER: Okay. Your Honor, they said that they were planning to spend $700,000.00 over the next four years. We say to you, that is simply not true. We will submit affidavits to show that. And this is very important, your Honor. There are three different programs that the FAA has had at the time when this IPO went into effect regarding maintenance of the 747-100. One was a program called the aging aircraft. Its primary function was to deal with metal fatigue. And what they mandated was that at the end of a

series of cycles, which amounted to approximately six years, you had to replace the front skin of the plane, which is a $1.9 million figure according to the FAA figures in 1990.

THE COURT: Is this in your papers?

MR. FISCHER: They said it was in the press.

This is one item.

THE COURT: Why is this not -- why wasn't this briefed for the Court if this is a basis for objecting to settlement?

MR. FISCHER: Your Honor, when did we -- we didn't know what their arguments were going to be. I didn't -- we asked your Honor -- your Honor may remember, the objections had to be filed before we knew what the submissions were. I can give you some more -- I'll give you some illustrations where we say Mr. Bernstein

didn't do his job.

Mr. Bernstein asked Mr. Nachtomi what was the reason for the non-stopping on the flights from New York to Israel. Mr. Nachtomi told him it was the nights -- they shortened the airport runway in Bangorian Airport. Bangorian Airport is where the plane is landing. That has nothing to do with the range of a plane taking off from New York.

He asked him another question. He said, what was the cause of the engine shutdowns. He told him -- THE COURT: I will hear you.

MR. FISCHER: He told him it was the desert -- it

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was the elements, the areas where the planes were operating. Well, your Honor, very interesting, if you really want to go about checking out what Mr. Nachtomi told Mr. Bernstein and Mr. Bernstein says I'm relying upon, it's very simple. The FAA publishes the monthly shutdown rate of all American Airlines.

Tower had a competitor flying for Garuda; the exact same route, the exact same distance, the exact same time period. They were flying -- it was World Airways. World Airways had seven planes flying at that point, flying the Hodge. World Airways had seven out of its eleven planes flying Hodge. Tower had five out of its thirteen planes flying Hodge in the exact same time period.

World Airways suffered two in-flight shutdowns at an average rate, if you look at the fleet statistics released by the FAA, and these were available to Mr. Bernstein if he wanted to check, where it was point one seven per thousand hours of operation. You look at the Tower operation, and this is a -- they have lessened their fleet out there, and they're suffering over a point four shutdowns per thousand hours.

In January, just three months before that, when the FAA had Pratt and Whitney come in to do a special inspection, this is before this Hodge, Pratt and Whitney wrote Tower and said we found a whole bunch of series of things involving primarily not doing routine maintenance. You're

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understaffed. They criticized the fact that they didn't have log

books. They didn't have manuals. They even at one point put in the comment, you know, these manuals are not expensive and they underline not.

THE COURT: Counsel, and what do you think should have been done to effect the stock price to insure that the stock price was fair and accurate?

MR. FISCHER: Your Honor, let's go back then --T H E COURT: No. See, this is -- MR. FISCHER: Your Honor, you're sitting on a settlement -- THE COURT: This is not helpful to me.

MR. FISCHER: -- where an attorney did not do his job.

THE COURT: I'm not sure that I agree with that and so to that extent I'm not interested in just ad hominem attacks here.

MR. FISCHER: I'm not -- your Honor, we have not. I'll go down the list and give you questions that were not raised.

THE COURT: I have a feeling that if I let you do this you'll be here until 7:00 o'clock tonight. The point that is before me is do I have claims that could have affected the stock price?

MR. FISCHER: Yes.

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THE COURT: And I'm asking you, what you just went on and on and on and on about, about their maintenance of this airplane, how is this -- what are you saying they should have disclosed and how would it have affected the stock price?

MR. FISCHER: Very simple, your Honor. On November 15, 1993, they should have disclosed, one, we own six aircrafts which are carried on our books at 62 -- at $102 million. On -- we intend to abandon those planes not in seven to twenty years as we say in our financials, but in four years. The market value of those planes should therefore actually be truly disclosed at 24 --THE COURT: That part of the argument I understand.

MR. FISCHER: Okay, let's go to the next one. We say to the public that we plan to do $700,000.00 worth of maintenance over the next four years. Your Honor, the FAA and its maintenance program mandates two different types of actions; one called terminating action, which means you remove the part from the plane and you replace it and then you don't have to inspect it.

THE COURT: None of that has to be disclosed.

MR. FISCHER: Oh, wait a minute, your Honor.

THE COURT: When you say the bottom line dollar figures should have been --Page 25

MR. FISCHER: Yes, let's go through that. If you do --THE COURT: I'm trying to.

MR. FISCHER: Okay. If you just do the routine maintenance, that you go in and inspect and just do the immediate repair that the FAA requires, not terminating action, just the routine, that's 500 to $600,000.00 a plane per year.

They submitted -- Mr. Bernstein had before him the figures for the routine compliance with the aging directives, not the terminating action which amounts to over $2 million, just the annual routine comparison. That was in his book. He didn't ask a question about it. It was seven million on one --it was 700,000 on one plane. It was about 800,000 on the other. If you look at the figures on that exhibit for the two planes which Mr. Caine (Ph) testified are typical, one was 700,000 for the aging aircraft requirements and the other one was about 800,000.

Then you want to talk about engine shutdown.
Engine shutdown rate for this airline is catastrophic. They -- if you looked at the chart that they give you before the IPO, that shutdown rate which Mr. Bernstein could have found out before he filed his complaint and he would have known what was wrong with the Garuda Hodge, he would have seen that it was three to four times the American industry rate. This is a
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disaster.

Pratt and Whitney came in and said, this is awful, your Honor. They said -- excuse me. Pratt and Whitney said to them, this is bad. You've got to change it. And even afterwards, if you look at the -- they had an audit report. I don't know who exactly audited it, but they had an audit report come in after the FAA went through there. This is on July 16th. The FAA was in there in June.

Now, Mr. Bernstein did not submit this to your Honor, but he had these papers because they're in the Goldman, Sachs file. They weren't produced by Tower. They were produced by Goldman,

Sachs, which is interesting. If you start to read off it, it says, "Tower Air personnel are inadequately trained on the airline's policies." Then it says, "Technical manuals: Currently all manuals and publications are dispersed throughout the entire office." Then it says, "General maintenance manual: Currently this manual does not meet the requirements of the FAA." Then we go to "Organizational structure: The position of director of maintenance is not presently filled and the senior duty manager who is assigned to cover his position is not available."

THE COURT: You can read anything you want. You can argue anything you want. You've got five more minutes. I just want that clear because this kind of minutiae, so

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unrelated to the nine factors that I have to discuss, is not proving helpful, but I'm going to give you five minutes to say anything you want.

MR. FISCHER: Excuse me, your Honor. We would request, your Honor, then we'd ask for additional time since the defendants needed approximately 60 days after the notice went out to submit papers. We would like, now that we've seen their papers, additional time. We will submit a brief briefing these issues now that we have an opportunity to know what they're arguing and we'd like to submit affidavits, your Honor.

THE COURT: Thank you. Mr. Bernstein?

MR. BERNSTEIN: Good morning, your Honor.

THE COURT: You can assume I've read your papers as well.

MR. BERNSTEIN: I'm going to ignore everything that I've prepared for today because I gather from your Honor that you are quite familiar with the file which makes things go a lot smoother. I'd like to respond just to very few points, not necessarily point by point, on the minutia and the triviality that Mr. Fisher presented. That's quite interesting. He sounds like a walking billboard for World Airways, and I question his true motivations here.

THE COURT: But it doesn't help to get into a comment either way, okay.

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MR. BERNSTEIN: This is not a silen[illegible]rity, your Honor.

That's one fact that I was not able to get out before. I would like to for the record both to introduce the publication notice and the mailing affidavit.

THE COURT: And also you have 125 proofs of claim that have been submitted.

MR. BERNSTEIN: Right.

THE COURT: I didn't notice that. When I said that it was a silent majority, I meant that I didn't have anyone writing to me saying please, please approve the settlement, but --M R . BERNSTEIN: I'd like to update.

THE COURT: -- I do understand that.

MR. BERNSTEIN: I would like to update that, your Honor. It's now up to 175 claims in the last week. I gather from the claims' administrator, over 235,000 shares have submitted -- are represented by those claims and that in fact is only the count in the 125 claims. They haven't yet counted the last 50 claims. But I know that -- THE COURT: All right, but to view the objector's arguments in the light most favorable to them, they're saying that my problem is that even those people don't fully understand the possible merits of the Branch, what I'll call the Branch claims, and that it's an uninformed approval that I'm getting. That's how I understand their argument to be

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postured.

MR. BERNSTEIN: I understand that argument, and let me briefly respond, and not point by point from the nose to the tail. Mr. Angstreich is obviously new to this case because he made several misrepresentations, the most important one is that he did not see the notice before it went out to the class members. This is a falsehood. They saw a draft of the notice. They made comments on the notice. We incorporated those comments, and the comments basically said you've misdescribed our case, the allegations. Why don't you copy what Judge Keenan put in in describing our case when he dismissed the case, which is something I'm sure your Honor hasn't forgotten.

But for the record, we're talking about a case that's been dismissed and they've recently filed an amended complaint. So, we

incorporated those comments. And nowhere did they ask us or say, ooh, we think that this particular claim is good or this one is bad. I don't think that that would be appropriate in the notice, but they didn't ask for it.

As far as the merits and the minutia, I think the easiest way to handle that is to go backwards, because there's a tremendous admission here by Mr. Angstreich which just confirms that -- why this whole case is -- was correctly litigated, being correctly settled and this is just a terrific

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settlement.

How do you measure the damages? I say you measure them by the way when the news came out about Garuda the stock dropped. That's what Section 11 says. The value of Tower's stock on that date was the trading price. It was an actively traded price. And they say, no, no, no, the truth about my case didn't come out until May when the Form 10Q had a brief mention of contingencies of this lawsuit and the stock dropped that date.

The stock drop had nothing to do with that, your Honor. The stock dropped when the news came out back in March. But if -- and that's my honest view, but if the Branch people believe that a notice and a 10Q or a K of a lawsuit is what causes a stock to drop, their lawsuit was disclosed.

Their lawsuit was disclosed several times in several questions. As we put in my affidavit and in my brief, the stock didn't drop then.

Their lawsuit was described in great detail in the notice that went to class members. The stock didn't drop then. This news is out there. This news, as Dr. Jarrell, the former chief economist at the Securities and Exchange Commission said, is not material to investors. It does not cause the price of stock to move. And they have not put in any testimony to the contrary.

They put in an expert affidavit of Mr. Miller. He

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says damages are $25 million, but he doesn't have any positive correlation between news and damages. Dr. Jarrell's report is about as comprehensive as one can get. It details a stock price, every movement. This wasn't news. It's not -- it may be news. It may

be interesting. It may be trivial. It may be coming from disgruntled former employees. It may be coming from competitors. I don't know where it's coming from, but it didn't cause the stock drop.

So, we have even the plaintiff's experts disputing whether damages are 12 million or 25 million. I know the defendant's experts will come in and say damages are zero. I probably owe them money. I know we've got tremendous disputed questions of fact about these abandoned planes. I mean, I just notice in the prospectus it says we may decide to liquidate the planes at the end of their useful life. It's right in the prospectus.

Point by point, I don't know if that would be productive because we tried to in our papers, and I know Mr.
Kadet, point by point, very detailed examined these claims. I offer for your Honor, you know, the exhibit, the affidavit of publication for the record and the affidavit of mailing and I'm happy to respond to anything. I think Professor Jarrell's analysis was exactly correct. I think they mischaracterized that and I'd be happy to explain that for your Honor, what numbers he did use and didn't use and how he tried to
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summarize it. I think they completely misinterpreted it, but I'm not quite sure that would be productive at this point.

THE COURT: All right. Thank you very much.
Perhaps I should allow defendant's counsel a word or two.

MR. KADET: Your Honor, I don't propose to take up any of your time. I think there's an ample basis before the Court to approve this settlement and I don't want our silence to be construed as agreement with anything that Mr.
Fischer or his colleague have put before your Honor. We categorically disagree with virtually every word of it, but I do not intend to elaborate on any of that. Our papers are thorough. We've discussed the claims and the objections. I think there's adequate measures before the Court to approve this settlement.

THE COURT: All right. I'm going to ask you to help me out. I of course have to balance these nine factors, and I'll speak in a minute about the ones that are most hotly in dispute between the parties. But after having read all of the papers in trying to deal with

some of those hotly disputed issues, I realized that I really hadn't focused on number seven, and I wondered if you did discuss it in your papers and I just read it too quickly. And that's the analysis I have to do of the ability of defendants to withstand the greater judgment.

Was there anything in the papers about that? I

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mean, I could have started to read from start to finish again, but I thought it was easier to just ask you.

MR. KADET: Frankly, your Honor, that's not a point that we did indeed address.

THE COURT: Okay, then I didn't overlook it.

MR. KADET: You did not overlook it.

THE COURT: Well, let me ask you whether you are able to make any kind of proffer to me along those lines so that I can discuss all of the factors. The airline is flying; correct?

MR. KADET: The airline is flying and we do engage in business. We have property and equipment despite Mr. Fischer's contexts to the contrary. I'm not familiar with the company's cash position, but obviously the spectra of the judgment along the lights that Mr. Fischer would purport to recover would of course have a materially adverse impact on my client, and it's not like they have the IPO sitting in the backings obviously used, as their public documents show, to run this business.

THE COURT: Now, may I also ask, when the airline lost the flight routes that are really the subject of this lawsuit that's initiated before me, that was for 1994?

MR. KADET: Yes. You use the word lost, your Honor, and that's what I was going to respond to.

THE COURT: Yes.

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MR. KADET: We did not get any contracts from Garuda for the 1994 Hodge. We did, as we pointed out in the papers, and it's a public document to show, receive a contract from Nigeria Airlines for 1994, admittedly in a very limited amount of dollars compared to what we had the prior year.

We're not disputing that.

THE COURT: And then in '95, pick up for me there.

MR. KADET: '95, your Honor, which no one seems to want to pay much attention to, we received a total of seven contracts for the Hodge, four of which were from Garuda and three of which were from an Indian airline. Those four that we got from Garuda, and to include at least two where the Indonesians gave us a waiver based on the age requirements.

I'm happy to report to your Honor, all the Tower stockholders here should be pleased to know that for purposes of the 1996 Hodge, my client has received not eight leases as indicated in the press release we put before your Honor, but a total of nine contracts for the 1996 Hodge, the one that's coming up this year. Of those nine, four are from Garuda and five are from a Saudi airline of some sort. As I understand -- THE COURT: Well, I had noticed --M R . KADET: So, my point simply is -- THE COURT: -- that, so I didn't ignore it.

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MR. KADET: -- this, the simple statement and prospectus that my client anticipated participating in this market area in the future has been confirmed and has been absolutely true. I think the record is abundantly clear that they had more than an ample base for making that statement at the time of the IPO. And to the extent, subsequent, to air that out, I think this record is overwhelming given their continued participation in this line of business.

Now, Mr. Fischer has carried on at some length about problems they had with in-flight engine shutdowns and the like. And I thought before we lose all sense of prospective in this matter, the position was that we would not get Garuda business because my client did a very bad job in 1993 in light of all the shutdowns. Well, obviously the Garuda people don't view it that way. They gave us four contracts this year. They've given us another four contracts this year. It's a relationship my client values, and, frankly, I believe it expects and hopes to continue beyond 1996.

So, as far as I'm concerned, the proof is in the pudding. We're doing business with these people to this day.

We're doing it this year. We did it last year and we hope to continue to do.

THE COURT: All right. Now, I asked those questions not because I necessarily adopt that view of the
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facts, I don't adopt anybody's view of the facts here, but I did notice some of these in the papers that were submitted and I thought it was relevant to my consideration of the factor of the complexity expense and likely duration of the litigation.

MR. KADET: Correct.

THE COURT: Because it seemed to me that even on the claim the plaintiff initially brought before this Court, that if this case were not to settle, as I said, the defendant would hardly just role over on the case, that there were real and viable issues here that could be advanced in a defense.

What a fact finder would decide is not something I can predict today, but I cannot overlook these real issues in deciding about the propriety of the settlement. Was there something else?

MR. KADET: No, I totally agree with what your Honor said.

THE COURT: All right. I will give the Branch objector another ten minutes. I'm sorry. I'm sorry.

Counsel, did you wish to add something?

MR. HARDIMAN: Your Honor, just for the record since there was a little confusion before, I just want to state for the record since we didn't submit papers that the underwriter defendants fully support the settlement.

THE COURT: Thank you.

MR. HARDIMAN: Thank you.

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THE COURT: I assumed that from your silence. I will give the Branch objectors another ten minutes if there's anything they'd like to note for the Court.

MR. ANGSTREICH: Your Honor, I don't think that ten minutes will advance the issue. Mr. Fischer asked the Court for an opportunity if the Court will allow it so that we could file a written response now that we have in hand the written papers of Mr. Bernstein.

THE COURT: I'm confused as to why that's really necessary. You know, when I set the schedule in this case and when I had

counsel before me once earlier, I agreed that the Branch objector could have access to a large amount of material. And I obtained the assurance of Mr. Bernstein that he would be available as plaintiff's counsel speaking to a class member to answer any and all questions. So, I really don't see what is in these papers that is surprising.

I do recognize that, and I have to take some care in this case that the approach that Branch has taken in this Court has been to try to promote delay. I mean, even the argument made to me about the adequacy of the notice, I didn't interrupt at the time, but I knew that Branch had seen the notice before it had gone out. This was not a case in which, you know, he too was surprised by the notice when he got it, or that he only realized this week that something was not disclosed. I mean, I'm very troubled by an attempt simply to

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delay.

MR. ANGSTREICH: Your Honor, we did not have an expert report from Mr. Bernstein to support the or justify the reasonableness of $2.5 million.

THE COURT: But this is not litigation. This is an attempt to decide -- I mean, this is not like let's -- you go out and hire your expert to see whether he agrees or disagrees.

MR. ANGSTREICH: Your Honor, when one settles a class action, one usually has a framework for analyzing the damages.

THE COURT: Absolutely. You're the litigant bringing this claim. I assume this has already been analyzed.

MR. ANGSTREICH: I don't quite understand. There was no opportunity -- THE COURT: Well, these are Branch's claims that you're saying have not been fully reviewed by plaintiff's counsel in this case. So, rather than attack his expert's analysis, all you needed to give me was your view of them which I have.

MR. FISCHER: Your Honor, can I -- I can tell you that we did not -- I still have not been served technically.

I had to send a messenger over on Monday to pick up Mr. Bernstein's papers.

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THE COURT: But you got them. I mean, at that point are you saying he should have a process server?

MR. FISCHER: Your Honor, it's the first time that we know his analysis. I'm talking about his analysis, a lawyer, as to what were the merits or the merits of the claims.

THE COURT: All right, so that's -- you have had them Sunday, Monday. You are the lawyer pursuing these claims.

MR. FISCHER: Fine. And we would like an opportunity on a motion for summary judgment, which this is more than a motion for summary judgment, the party -- the opposing summary judgment is entitled to a reasonable opportunity to respond.

THE COURT: Right, but that's not what this is.

MR. FISCHER: It should be, your Honor. That's the exact same effect. There was a claim filed -- THE COURT: No, your client can pursue its claim. Your client, Mr. Branch, can pursue his claim. The question is whether I should allow you as an attempted class party to tie up everybody else who is before this Court. You are not the class attorney in this Court.

MR. FISCHER: Your Honor, may we have ten days to submit a written -- THE COURT: No, I'm going to hear this today. I

mean, I've read through these papers with some care this week in an attempt to be ready to rule today because every delay in essence requires notice to the entire class again.

MR. KADET: It's also horrifically expensive for us, your Honor.

THE COURT: Well, let me say that while I don't dismiss that, that is not a factor that I weigh in this. What concerns me, as I said, in a class settlement I would think that fairness would require that every time I delay a decision from a day on which I notified the class that I would make it, I must advise that class of what's going on and why, and I am disinclined to do that again here.

Mr. Bernstein, you want to be heard?

MR. BERNSTEIN: I also point out the scheduling is one that's frequently filed -- followed in securities class actions and class actions generally, and, in fact, in the Weinberger versus Kendrich case, the leading case on settlements, the objections are due the week before the hearing and the papers in support were actually filed

there and it was upheld the day before the hearing. And the Second Circuit said that's fine. They knew what we were going to say. I guess what they're claiming now is that they didn't know that Professor Jarrell would calculate $12 million damages. They thought maybe he would come up with a higher number or a lower number. But it doesn't really matter

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because on the merits of the case, as opposed to the damages and the liability, they had the entire record. They had everything that I had and they had access to me. They asked me questions and I responded to everyone within one business day.

THE COURT: All right. This was the day that the class members were noticed that this Court would address and rule on the proposed settlement in this case. Let me discuss the factors that are relevant to this Court's analysis. Let me first say a few words, though, about the fact that there was a settlement class certified in this action.

I am satisfied from the applicable case law that this is an appropriate way to proceed, indeed the case law suggests that it may be an ideal way to proceed in the sense that a host of people, all with similarly situated claims, are given notice that a settlement has been proposed. They are then given the option to either join in that settlement or opt out of it. And indeed in this case, three parties have opted out and will be able to pursue these or any other claims they think they can advance and sustain against the defendants in this case. Indeed, I intend to let Mr. Branch opt out if at the conclusion of this proceeding he wishes to do so.

But having carefully reviewed the case law about settlement classes, I am satisfied that it was appropriate to certify a settlement class in this case. And so I must turn

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to the actual settlement proposed.

As I've said, I carefully read all of the papers.

The first factor that's relevant to the Court's decision is plainly evidenced here. This is a complex expensive and lengthy litigation that is before the Court. It was so in its original formulation when plaintiff sought to sue defendants for securities violations linked

primarily to the failure to disclose what we call the Hodge facts. It has become even more so with the addition of those complaints that were brought initially in the Southern District in what we've called the Branch litigation.

Now, I am not going to try to articulate each and every claim that would be before the Court or a fact finder if this case were to proceed, but in its present posture before this Court, what would have to be reviewed and analyzed by first the lawyers and then the Court and jury would be a host of issues relating to the operation of this airline and then an analysis of what if any omissions, accounting factors, business decisions, should properly have been disclosed to shareholders, what if any effect nondisclosure had on the market price of this stock. As I said, I would have to view this case as extremely complex, very lengthy and very expensive for all parties involved.

The second factor I have to consider is the reaction of the class to the settlement. Now, viewed very

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broadly, I would have to say that the class appears to support the settlement. 175 proofs of claim have already been submitted. Of 5,000 notices sent out, at most three have objected, but I can't look at it simply on the surface like that.

There is an argument made to me by Mr. Branch that the notice was somehow inadequate, and certainly if there were inadequate notices, the Court would have to view that very, very seriously. The argument I've just heard about why the notice was inadequate is that it failed adequately to apprise the shareholders of the scope of the claims that Branch thinks should be pursued and of their likelihood of success.

I'll note preliminarily that as Mr. Bernstein has pointed out, he did entertain comments from Branch on the notice and even amended the notice to accommodate some of those suggestions. And so I look perhaps with something of a jaundiced eye on Branch's complaints about the notice at this point. But my task is not simply to express dismay that Branch didn't raise these points earlier. My obligation has to be to the entire class, which requires me to make an informed decision about whether the notice is

sufficient.

Having carefully reviewed all of Branch's papers, I am satisfied that the notice was adequate to allow the class to make intelligent decisions as to whether to opt out of this settlement or whether simply by silence or by the filing of

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notice -- proof of claim, rather, to join in it.

Now, I recognize that what counsel for Branch has done today has been to try to get me to focus on some of the fine points about each and every claim, to try to persuade me that these are strong claims likely to succeed. While I always respect the vigor with which any advocate would advance his client's position, I'm simply not persuaded that the claims are as strong as counsel notes. Without even getting into the business judgments and accounting issues that have been raised, the real almost bottom line problem I have with many of these claims is the ability to show that they caused securities law damages and it is because of my concern in that area that I cannot say that this class was not adequately notified about tremendously meritorious claims that were basically being compromised in this settlement.

My overall review of the record suggests that the strongest claim that can be advanced under the securities law is the one that was inertly brought before this Court. Even there, as I hope my questioning of defense counsel showed, I recognized that there are triable issues, but that seems to me to be the issue on which the class was most likely to achieve any recovery. And let me say further with respect to that, that even assuming that some of the Branch claims had merits as well as the Hodge claim, the ultimate jury question would be: How much damage was caused by that?

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Where an omission as to one material fact would likely have caused a tremendous difference in stock price, the fact that other omissions may also have been material may not necessarily have resulted in any further compromise in the stock price. I'm not saying that you might not have persuaded a jury that they did. I'm simply saying that this was a very tough -- this would be a very tough claim to make. And so, I cannot say that the class was

inadequately notified what their chances of success would be on the further Branch claims.

Now, I've dwelt on this so much because the real issue before this Court, if we were to strip everything of rhetoric, is whether I should allow the Branch claims to be settled and compromised. I really have no objector on settling the initial Hodge claims. It's the defendants who won't settle on those terms. So, I'm almost deciding whether the Branch claims should be settled here, and that's why I've devoted so much time to this.

Just to continue in taking the factors in the order in which they're usually discussed in the case law, the stage of the proceedings and the amount of discovery completed is the next issue I have to address. On the Hodge claim, I'm satisfied that the amount of discovery completed is significant and requires nothing further for intelligent decisions to be made about settlement. There is the argument made before me that plaintiff's counsel has done so little
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investigation into the Branch claims that he's compromising them prematurely.

Having reviewed all of the papers, again, and particularly focusing on the exhibits attached to all of the papers, I am satisfied that plaintiff's counsel, experienced in this area and with an apparent sensitivity to the claims of his client, is not prematurely compromising these claims.

I recognize that the Branch claims were dismissed before Judge Keenan, but I don't see that as something that I should give too much weight to. Judge Keenan said they could be repleaded. He was concerned that there was insufficient factual pleading in the complaint. He wasn't making a statement that no complaint could be pleaded to state the claims. So, I don't rely on that. Rather, I rely on the actual submissions of the parties.

Plaintiff has asked for more time to respond -- I'm sorry, not plaintiff, Mr. Branch's counsel. Plaintiff in the Branch case has asked for more time to respond to what Mr.
Bernstein has submitted. Why I don't give that is that Branch did not need to see Mr. Bernstein's submissions to be able to put together a showing of what more should be known by everyone

about the Branch litigation. Indeed, it's been his claim that he knows so much about it, that to not allow him to pursue the class claims is what's unjust here. And so I think that the desire for more time is really simply a delay tactic

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that, as I said, complicates dealing with this class tremendously and with no good purpose. I am satisfied that adequate inquiry has been made by plaintiff's counsel before me to allow the case to be settled.

Let me deal with the next two factors together, the risks of establishing liability and the risks of establishing damages. As I've already said, I think there is a real risk to plaintiff in establishing liability on all of the claims brought hear, including the Hodge claims. They may succeed in the end on these as well as some of the Branch claims, but there are real defenses here and they would be vigorously pursued. I cannot say that this is not an appropriate discounting factor in a settlement. The risks of establishing damages here seems even higher to me and particularly with respect to the Branch claims. I mean, the Branch claims are myriad. And while I recognize the significance of not fairly accounting for assets or not listing expenses that one can reasonably expect will be incurred, especially when they go into the hundreds of thousands, if in the millions of dollars, I have more serious questions about what securities law damages would be attributed to not disclosing that a son was hired or some of the other claims that seem to relate more to business judgments. I don't either support or condemn those business judgments. I'm just saying that the risks of establishing

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damages are very high here.

The risks of maintaining the class action through the trial do not appear to me to be a problem here. From everything I've seen, heard from counsel, from my assessment of counsel in the case, I'm sure that the class action would be maintained vigorously throughout a trial. That's not a factor that causes me to approve the settlement. The ability of the defendants to withstand a greater judgment was, as I said, the one factor that I hadn't really focused on and it's now apparent to me why it's not discussed in the papers. In light of

that, I will assume for purposes of this discussion that the defendants could withstand a greater judgment.
Otherwise I would think people would come before me with this, with the papers.

But, you know, there have been various claims as to what the potential damages in this case would be. Whether a company could withstand $25 million in damages as easily as it could maintain or sustain $12 million or 9.6 million, which are among the various numbers that have been thrown out to me, are very, very different questions. There's also, of course, the blunt reality that over a certain number, a company would always litigate rather than pay a settlement. And so, I do have to conclude that while defendants may be prepared to settle for 2.5 million, it is very probable that they would not settle for anything in the neighborhood of 20 million or

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25 million or whatever the amount plaintiff believes the actual damages in this case are, that there we would be into the lengthy and expensive litigation that would likely be involved here.

The next factor I have to consider is the range of reasonableness of the settlement fund in light of the best possible recovery. And the last factor is actually linked to it, the range of reasonableness of the settlement fund relative to a possible recovery in light of all the attendant risks of litigation. This is one of the factors that I also see is in sharp dispute and which I've given some careful attention to.

The plaintiff advises me that the damages in this case are perhaps in the neighborhood of $12 million, and so a $2.5 million recovery is not on its face an extraordinarily high one. Plaintiff asks me to consider the fact that the entire market had a 20 percent decline in its stock prices.

And when that's considered perhaps the settlement looks a little better.

I also have to consider what the Branch plaintiff tells me, which is that their analysis suggests that the loss could be as high as $25 million or $20 million, but something in that neighborhood, and that compared to that, the settlement is even smaller.

I will assume for purposes of today's discussion

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that the loss could indeed be higher than $12 million, that a jury would possibly find that the stock price had declined or that the loss suffered was far in excess of $12 million, possibly as high as $20 million and decide whether or not I think it's reasonable to settle this case for $2.5 million under those circumstances. I initially looked at that with some skepticism because I would be concerned about shareholders compromising the claim at that dollar amount if the loss was that high. But having carefully reviewed all of the papers, I am satisfied that the risks of succeeding on the Hodge claim are such that the plaintiff has to be prepared to discount its claim considerably, that the risks of succeeding on the Branch claim, being even higher, it seems to me that the discounting should be even higher.

When I add to that the fact that this litigation would likely be long, possibly not reaching trial for another two years, if then, the fact that there is the possibility for a prompt recovery for the shareholders seems reasonable to me. I weigh in this decision the fact that I have experienced plaintiff's counsel before me. It is not my task simply to blindly accept the recommendation, even of experienced plaintiff's counsel, and so I want to emphasize that I have not done that. And given the possible recovery, given the settlement amount, I have perhaps spent more time with all the papers than I would if the dollar amount here were higher.
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But even recognizing the Branch plaintiff's optimistic view of what it could recover, when I balance all of the factors before me, I'm satisfied that this is a fair, just and appropriate settlement.

I of course will allow Mr. Branch who feels so strongly about his claims to opt out and to pursue them in another forum if he wishes to do so, but I will not hold up the payment of the settlement monies to the other class members while this -- while Mr. Branch or the other opt out parties pursue their claims. And so I intend to approve the settlement.

Now, there are two other issues; one is the award of attorney's fees, the other is the application for sanctions. I'd like to deal with the sanctions question first and perhaps short-circuit it. Did you see

these?

MR. KADET: Yes, your Honor. I saw the document from Mr. Fischer. We have not received our papers and on that basis I'm prepared to withdraw that application.

THE COURT: All right, so I'm not imposing any sanctions in the case.

MR. ANGSTREICH: Your Honor, we have taken no position and made no objection with respect to the attorney's fees issue. So, in light of the fact that your Honor is going to approve the settlement, we see no reason why Mr. Bernstein couldn't just proceed and we will step to the back.

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THE COURT: All right.

MR. ANGSTREICH: Thank you, your Honor.

THE COURT: I gather no one has filed anything to oppose the attorney's fees except perhaps for the facts that you gave me, Mr. Bernstein? I'm going to approve your fees, but let me make a few statements on the record even here about this.

You've asked for a third of the settlement funds for attorney's fees. That would result in something over 700 -- almost $800,000.00 being paid here, plus expenses. And I've looked at the expenses and given the type of case that it is, I don't see them as having been exorbitant.

Since the class was told that no more than a third of the recovery would be sought as attorney fees, I have to say that when the amount of recovery versus the possible damages is the percentage it is in this case, and when counsel is taking a third of that as attorney fees, I think it's appropriate for a Court to look hard at whether that's fair and just or whether perhaps more should be available for the recovery fund. I've done that in this case.

I'm satisfied that the quality of the legal work throughout has been high and conscientious and mindful of the fact that this is typical of the recovery awarded in so many of these cases. I am prepared to award it.

I rely on this percentage fee, rather than your

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attempt to argue to me that even on a loan star calculation, this

would be awarded. While I recognize that there are lawyers who do receive that dollar amount and that sometimes there are even additional amounts paid for the complexity of the case, I have to say that since the recovery is in the third of the amount, I have no real knowledge of how many people are successful in recovering those kinds of attorney's fees in full from their clients. So, that's the reason I award it, because of the typicality of this kind of an award and my satisfaction that the attorney's work throughout has been of high quality and conscientious.

Is there anything else that anybody would like to be heard on today?

MR. BERNSTEIN: No, your Honor.

THE COURT: Do you have a proposed order?

MR. BERNSTEIN: We have a proposed order, and if I might just take a second to mark it up.

THE COURT: Counsel, thank you very much.

MR. BERNSTEIN: Your Honor, the arithmetic is slightly higher, it's 833.

THE COURT: All right, let me take a look at it.
Have you had a chance to see it, counsel?

MR. KADET: Yes. We have no objection to it, your Honor. Thank you.

THE COURT: All right.
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MR. BERNSTEIN: It's the exact judgment in the proposed order but we've added the names of the exclusions as an Exhibit A.

THE COURT: And did you add Mr. Branch's name?

MR. BERNSTEIN: He has not indicated he's opting out.

THE COURT: Would you just see if counsel is there. I've said two or three times that I would give him that option and I assumed from his silence that he was taking that option.

MR. BERNSTEIN: Oh, no, I assume we're visiting Foley Square.

MR. KADET: He'll do what he's going to do. We have no objection to his name being added after your Honor enters a judgment.

THE COURT: Fine.

MR. BERNSTEIN: I mean, he ordered a disk before we got in.

THE COURT: Fine. All right. That's fine. I just want to make sure that that's the case.

MR. KADET: Yeah. We would have no objection to them adding his name.

THE COURT: Let me read this.

MR. ANGSTREICH: My apologies, Judge.

THE COURT: Counsel, I just wanted to be clear

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because I'm about to sign this order, does your client want to be listed as an opt out party or not?

MR. ANGSTREICH: No, your Honor, not as far as I know. I think Mr. Fischer intends to pursue whatever avenues he has.

THE COURT: Fine. I just wanted to make sure that it was clear in the document that I'm about to sign.

Thank you very much.

MR. ANGSTREICH: Thank you.

THE COURT: All right. Now, as I look at the list of defendants who are being released in this case, counsel for Branch mentioned to me there was somebody who is a defendant in the Southern District action who is not a defendant here. Do you recall who that is?

MR. BERNSTEIN: What it is is there are some released parties that are not defendants here; Urnston Young (Ph) being one in particular that he mentioned, and some of the original selling shareholders, some individuals who sold.

So that's who is listed here. The defendants here are, well, I don't know if it's broken up to your -- THE COURT: Well, I gather he was objecting to the release of those parties since they were not defendants before the Court.

MR. BERNSTEIN: He -- I think he was trying to argue that you are preventing him from suing those people and

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that the order does do that and they are being released.

That's what the notice -- and the notice clearly set that forth.

THE COURT: All right. It's the same in another context in another case in which I settled or tried to help the parties settle

earlier this week. One of the issues was whether parties not before the Court could voluntarily participate in a global settlement discussion in order to reach a resolution of a matter in which there was a limited fund. Now, the context was very different, but I satisfied myself there that certainly parties can join in settlements and particularly here where the class was given notice that this was going to be the case. I'm prepared to sign this.

I would have to say that the likelihood of pursuing the claims against these parties seems even more remote to me. I mean, the principal parties who could be held accountable for all of the claims here have always been named defendants before me.

All right, thank you all very much. I really appreciate the papers. It makes the Court's task easier when they are so well set out.

MR. BERNSTEIN: Thank you very much, your Honor.

ALL COUNSEL: Thank you.

THE COURT: From the defendant's perspective, too, definitely, thank you.